Supreme Court, U.S.
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No. 92-571

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

PAINEWEBBER INCORPORATED,
Petitioner,

v.

BANKATLANTIC,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, in this diversity case, the Eleventh Circuit properly affirmed the district court's order and subsequent judgment in favor of BankAtlantic holding that PaineWebber had failed under governing Florida law to state a cause of action in its counterclaim for attorney's fees and costs pursuant to an alleged indemnification agreement.

PARTIES TO THE PROCEEDING

Petitioner is PaineWebber, Incorporated, f/k/a Blyth Eastman Paine Webber Incorporated.

Respondent is BankAtlantic Savings Bank, a Federal Savings Bank, f/k/a Atlantic Federal Savings and Loan Association of Ft. Lauderdale.

DESIGNATION OF CORPORATE RELATIONSHIPS

Respondent's parent corporation is BFC Financial Corporation, f/k/a BankAtlantic Financial Corporation, f/k/a I.R.S. Financial Corporation. The entities affiliated with the parent are:

2000 South Dixie Corp.
B. & N. General Corp.
B.K. General Corporation
B.K.S. General Corporation
B.W. General Corporation
Chicago Heights General Corp.
Eden Services, Inc.
Eden United, Inc.
First Pensacola Mortgage Company, Inc.
Florida Partners Corporation
H.D. General Corporation
H.K. General Corporation
I.R.E. Advisors, Corp.
I.R.E. Advisors Series 21, Corp.
I.R.E. Advisors Series 23, Corp.
I.R.E. Advisors Series 24, Corp.
I.R.E. Advisors Series 25, Corp.
I.R.E. Advisors Series 26, Corp.
I.R.E. Advisors Series 27, Corp.
I.R.E. Advisors Series 28, Corp.
I.R.E. Advisors Series 29, Corp.
I.R.E. BMOC, Inc.
I.R.E. Commercial Properties, Inc.
I.R.E. Computer Resources, Inc.

I.R.E. Condominium Management, Inc.
I.R.E. Energy 1981, Inc.
I.R.E. First Florida, Inc.
I.R.E. Growth Fund, Ltd.-Series 29
I.R.E. Income Advisors Corp.
I.R.E. Investments, Inc.
I.R.E. Konica, Inc.
I.R.E. Leasing, Inc.
I.R.E. Lennar, Inc.
I.R.E. North River, Inc.
I.R.E. Pension Advisors Corp.
I.R.E. Pension Advisors-II Corp.
I.R.E. Pension Investors, Ltd.
I.R.E. Pension Investors, Ltd.-II
I.R.E. Pinebrook, Inc.
I.R.E. Professional, Inc.
I.R.E. Properties, Inc.
I.R.E. Property Analysts, Inc.
I.R.E. Property Management, Inc.
I.R.E. Real Estate Corporation (THE)
I.R.E. Real Estate Fund, Ltd.-Series 21
I.R.E. Real Estate Fund, Ltd.-Series 23
I.R.E. Real Estate Fund, Ltd.-Series 24
I.R.E. Real Estate Fund, Ltd.-Series 25
I.R.E. Real Estate Fund, Ltd.-Series 26
I.R.E. Real Estate Fund, Ltd-Series 27
I.R.E. Real Estate Funds, Inc.
I.R.E. Real Estate Growth Fund, Ltd.-Series 28
I.R.E. Real Estate Income Fund, Ltd.
I.R.E. Real Estate Investment, Series 2, Inc.
I.R.E. Real Estate Investments, Inc.
I.R.E. Realty Advisory Group, Inc.
I.R.E. Shopping Center Development
I.R.E. Texas, Inc.
I.R.E. Wren Park, Inc.
Investors Sheltered Securities, Inc.
N.C. & G. General Corporation
North Miami General Corp.

Pengro Associates, Inc.
Professional Data Corporation
Realty 2000 Corporation
Rushmore Realty, Inc.
S & P General Corp.
S.T. General Corporation
Saxon S.L. General Corporation
Saxon S.W. General Corporation
Southern National General Corporation
Tanglewood College Station, Inc.
Tigertail General Corporation
Toy Associates, Inc.
Toy General Corporation
Travis House Apartments, Inc.
U.S. Capital Corp.
U.S. Capital Securities, Inc.
W.P. General Corporation
Z.W. General Corp.

Entities affiliated with the respondent are:

Atlantic Investment 68 Avenue Corp.
Atlantic Investment Broward Boulevard Corporation
Atlantic Investment Clifton Corp.
Atlantic Investment Commercial, Inc.
Atlantic Investment Cypress Lane Corp.
Atlantic Investment Jacaranda Corp.
Atlantic Investment Pelican Point Corp.
Atlantic Investment Pines Point Corporation
Atlantic Investment Taft Street Corp.
BankAtlantic Development Corporation
BankAtlantic Leasing
Fidelity Service Corporation
Hammock Homes, Incorporated
Heartwood 1, Inc.
Heartwood 2, Inc.
Heartwood 3, Inc.
Heartwood 4, Inc.
Heartwood 5, Inc.

Heartwood 6, Inc.
Heartwood 7, Inc.
Heartwood 8, Inc.
Heartwood 9, Inc.
Heartwood 10, Inc.
Heartwood 11, Inc.
Heartwood 12, Inc.
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Heartwood 16, Inc.
Heartwood 17, Inc.
Heartwood 18, Inc.
Heartwood 19, Inc.
Heartwood 20, Inc.
Heartwood 87 Incorporated
Heartwood 88 Incorporated
Heartwood 90 Incorporated
Heartwood 91 Incorporated
Heartwood 91-1 Incorporated
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Heartwood 91-3 Incorporated
Heartwood 91-4 Incorporated
Heartwood-Promenade Incorporated
Professional Valuation Services, Inc.

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BRIEF IN OPPOSITION

Respondent, BankAtlantic Savings Bank ("BankAtlantic"), requests that the petition for writ of certiorari be denied. The judgment entered by the district court against PaineWebber on its counterclaim for attorney's fees and costs pursuant to an alleged indemnification agreement was based solely upon PaineWebber's failure to state a cause of action according to the express terms of the agreement itself and the controlling law of Florida in this diversity action. Despite PaineWebber's tortured attempt to manufacture two issues, none of the special and important reasons for granting a writ as suggested in Rule 10 of this Court is even remotely involved in

either the entry or subsequent review of the judgment against PaineWebber on its counterclaim.

OPINIONS BELOW

Omitted from the listing in PaineWebber's petition is the Final Judgment dated January 20, 1990. A copy of the judgment was included in the appendix at A-34.

STATEMENT OF THE CASE

At its heart, and from the very beginning, this has been a case about PaineWebber's omissions, misrepresentations, and conduct lacking in fundamental honesty and integrity. The behavior of PaineWebber toward BankAtlantic prior to and during this litigation and the behavior of PaineWebber toward the jury, the district court, and the Eleventh Circuit has consistently been marked by this fundamental lack of honesty.[1]

PaineWebber now seeks to extend its fraudulent and deceptive behavior toward this Court in a contrived attempt to obtain review. Contrary to PaineWebber's assertions, entry of judgment on the counterclaim has little or nothing to do with federal law or the administration of the federal courts. As the district court's own order states on its face, the judgment was based on the language of the indemnification agreement itself and well-established principles of Florida law. A-51-52. PaineWebber is desperate to establish some basis for recovery of attorney's fees to offset the $350,079.80 in fees and costs it must pay to BankAtlantic as a Rule 11 sanction imposed in this case.[2]

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[1] An aspect of this—intentionally orchestrated attorney and juror misconduct—is raised in BankAtlantic's cross-petition.

[2] The appeal of this sanction by PaineWebber and its prior attorneys is still in the briefing stage before the Eleventh Circuit. PaineWebber's other attempt to obtain offsetting attorney's fees (a Rule 11 motion against BankAtlantic) has already been rejected by both the district court and the Eleventh Circuit.

Even if PaineWebber's "questions" did raise important issues, which, of course, they do not, PaineWebber has, nonetheless, misrepresented to this Court the fundamental factual bases upon which both of those "questions" are based. Despite PaineWebber's assertion to the contrary, the facts mentioned by the Eleventh Circuit in its opinion *were* before the district court at the time it decided to grant the judgment on the counterclaim (Question 1). R11-341-3; R23-498-3. In addition, the "economic loss rule" never had anything to do with the judgment on the counterclaim in either the district court or the Eleventh Circuit (Question 2). A-26-29, 34, 37, 51-52.

A. Initial Pleadings, Discovery, And A Rule 11 Sanction.

BankAtlantic sued PaineWebber for breach of fiduciary duty, fraud, constructive fraud, fraudulent concealment, misrepresentation, and negligence. A-93-100. The essence of the tort claims was that PaineWebber had a fiduciary relationship with BankAtlantic, that PaineWebber abused the fiduciary relationship by misrepresentations and omissions to induce BankAtlantic into entering into and staying in two interest rate swaps that caused BankAtlantic to wire transfer $24 million to another PaineWebber client in Califonria (Homestead Savings), that the two swap transactions recommended by PaineWebber (which caused BankAtlantic to lose all $24 million in cash and another $6 million of interest) made no sense for BankAtlantic looking at its business as a whole, and that the PaineWebber employees who recommended the swaps lied about their expertise (admitting at trial that they had none), lied about the supposed benefits of the transactions, and concealed most of the information they had about their extensive and highly profitable relationship with Homestead, about the problems at Homestead, and about the huge and difficult to understand risks of these particular interest rate swap transactions.[3]

---

[3] The transactions involved in this case were very complicated. The interest rate swap agreements were, as structured by Paine

BankAtlantic also sued PaineWebber for breach of contract. A-100-101. The essence of the contract claim was that PaineWebber completely failed to provide any services whatsoever under a financial advisor agreement causing BankAtlantic to lose the amount of the fees it had paid to PaineWebber. Considering the relative insignificance of this claim as compared to the losses caused by the swap transactions, the breach of contract claim was dropped during trial.[4]

In its responses to these claims—before, during, and after trial (until its brief to the Eleventh Circuit)—PaineWebber consistently took the position "that the financial advisor agreement *did not* cover the swaps." R38-711-9 (emphasis in the original). As PaineWebber told the trial court in a written memorandum regarding its affirmative defenses to the tort claims filed long *before* trial: "It is important to distinguish that the damages which BankAtlantic now claims result solely from the swaps, not from any alleged breach of this Financial Advisory Agreement. *The interest rate swaps were* [*an*]

Webber, merely part of a larger "dynamic hedge" against adjustable rate mortgages designed to extend over a period of seven years. Not only honesty but also highly specialized expertise (both of which PaineWebber falsely represented that it had) is required to determine if such transactions are appropriate for any particular institution and, if so, to properly effectuate them. The same honesty and expertise is then required to manage the situation over the life of the swaps. As even PaineWebber's own expert stated, this is "tricky" business.

[4] PaineWebber suggests that after it was terminated for nonperformance, a "corporate raider" gained control of BankAtlantic and decided to sue PaineWebber for revenge. This is merely the most genteel assertion of PaineWebber's totally false and vicious personal attack on BankAtlantic's chairman at trial. In fact, BankAtlantic's chairman had never before taken control of an existing company, instead building all of his own businesses from scratch. PaineWebber's personal attack on the chairman was a ruse to divert attention from its horrendous—but very complicated and thus difficult to understand—wrongdoing.

entirely separate and unrelated transaction." R11-341-3 (emphasis added). And as PaineWebber itself further noted, BankAtlantic considered the primary significance of the financial advisory agreement to this case to be an "enhance[ment of] the standard of care owned by [PaineWebber] with respect to the interest rate swap transactions to one of a fiduciary duty." *Id.*

With the issues thus framed, the case proceeded in a rather uneventful manner. Extensive discovery was conducted on BankAtlantic claims and all the issues in the case for nearly two years after this action was commenced in August of 1987. Trial was specially set for June 19, 1989.

Then, on the eve of trial, BankAtlantic learned through independent investigation that PaineWebber and its counsel had intentionally defied discovery rules and violated a district court discovery order by concealing a substantial body of documents evidencing PaineWebber's breach of fiduciary duty to BankAtlantic. Those documents related to the relationship between PaineWebber and Homestead, the swap partner with which PaineWebber had matched BankAtlantic in the very costly, and totally inappropriate, interest rate swap transactions. BankAtlantic moved for sanctions under Rule 11.

On July 10, 1989, the district judge entered a lengthy "Memorandum Order" outlining the violations. *BankAtlantic v. Blyth Eastman PaineWebber, Inc.*, 127 F.R.D. 224 (S.D. Fla. 1989). The trial judge stated: "In short, [PaineWebber] did its utmost to keep [BankAtlantic] in the dark, and the truth hidden." *Id.* at 233. The judge expressly ruled that after trial, he would award attorney's fees and costs to BankAtlantic as sanctions against PaineWebber and its counsel. *Id.* at 235-36.

B. PaineWebber's Counterclaim.

Immediately after the sanction order was entered, new counsel appeared in the case for PaineWebber, and the prior counsel was ultimately removed. The trial was con-

tinued until October. During this continuance caused by its own wrongdoing, PaineWebber took advantage of the opportunity and filed the counterclaim featured in its petition before this Court. A-66-82.

The counterclaim alleged a right to recover from BankAtlantic the fees and costs PaineWebber was incurring in this suit based on an indemnification theory. The alleged factual basis for the claimed indemnification was a letter attached as Exhibit B to the counterclaim. A-78-82.

Contrary to the general allegations of PaineWebber's counterclaim, however, the first and third paragraphs of the indemnification letter specifically state on their face that indemnification is for actions related to or arising out of the financial advisor agreement, which bears the same date as the indemnification agreement. A72, 78-80. The indemnification agreement is, therefore, by its own terms, collateral to, and co-extensive with, the financial advisor agreement, which PaineWebber has repeatedly said to be unrelated to the swaps.

Moreover, the letter does not anywhere explicitly state that PaineWebber would be released for its own negligence as against any claims by BankAtlantic. Instead, the letter contains only general indemnification and notice provisions showing a clear intent on the fact of the letter that indemnification applies solely to claims by third parties against PaineWebber. A-78-82. BankAtlantic, therefore, promptly moved for judgment on the pleadings based upon Florida contract and indemnification law principles. R28-562.

C. Judgment On The Counterclaim.

PaineWebber responded to BankAtlantic's motion by also moving for judgment on the pleadings as to its counterclaim as well as for summary judgment on the misrepresentation and negligence counts of the amended complaint based upon the indemnification agreement. The

district court determined, therefore, that the counterclaim could be decided as a matter of Florida law. A-51.

The district court clearly stated its rationale for the judgment against PaineWebber:

> The ordinary purpose of an indemnification agreement between two parties is to shift liability for claims asserted by third parties. Defendant contends, however, that Plaintiff has agreed to indemnify Defendant against claims held by Plaintiff against Defendant. In essence, then, Defendant has read the indemnification agreement as a *release* of claims that Plaintiff might otherwise assert against Defendant.
>
> The indemnity provision does not support Defendant's position because the provision does not speak in terms of a release of liability. The lead sentence of the indemnity provision states, "Since BEPW will be acting on behalf of the Association [BankAtlantic], the Association agrees that it will indemnify and hold harmless BEPW . . . ." Similarly, the indemnity provision requires Defendant to give notice to Plaintiff of receipt of claims covered by the agreement. Plainly, the parties intended to shift liability from Defendant to Plaintiff for certain third party claims resulting from Defendant's agency relationship with Plaintiff.

A-51-52 (emphasis in original). This rationale is in complete harmony with the express terms of the indemnification agreement and with Florida law on contract interpretation in general and exculpatory clauses in particular.

Based upon this rationale, the district court granted BankAtlantic's motion for judgment on the pleadings and denied PaineWebber's cross motions. A-52. Rehearing was denied, and final judgment on the counterclaim was entered. A-34, 37.

D. Affirmance By The Eleventh Circuit.

In its initial brief on appeal to the Eleventh Circuit, BankAtlantic demonstrated in detail that it had been

established without dispute at trial that PaineWebber had breached a fiduciary duty to BankAtlantic causing $30 million in damages.[5] BankAtlantic explained that the financial advisor agreement was part of the evidence that PaineWebber stood in a fiduciary relationship to BankAtlantic, but BankAtlantic did not argue, as asserted by PaineWebber in its petition, that all of the claims against PaineWebber "arose out of and were dependent on the financial advisor agreement." Petition at 5. Indeed, *prior* to trial PaineWebber had itself specifically acknowledged that the swaps were not part of the advisor agreement and that BankAtlantic had alleged the existence of the agreement merely to "enhance the standard of care by [PaineWebber] with respect to the interest rate swap transactions to one of a fiduciary duty." R11-341-3.

BankAtlantic's initial brief also demonstrated that this case was not tried to an impartial jury nor was it tried on the merits. The foreman of the jury had concealed that he was employed by a law school classmate of one of PaineWebber's trial counsel and that he had read, in violation of an express court order, on the day of closing arguments and jury deliberation, a highly prejudicial and inaccurate article containing adverse assertions about BankAtlantic and its chairman, an article that the juror

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[5] PaineWebber's assertion on page 21 of its petition that "BankAtlantic's officers admitted at trial that BankAtlantic had not suffered any loss or damage" is characteristic of PaineWebber's crass deception throughout this case. In fact, there was testimony from only one witness, a former officer who had been fired by BankAtlantic for incompetence. His testimony was a distorted manipulation of the complicated "expensing" accounting principles employed by BankAtlantic to recognize on the bank's financial statements the swap losses as they were actually paid over the term of the swaps rather than all at once on a "mark to market" basis. Even that former officer, upon cross examination, admitted that millions of dollars actually flowed from the company as a direct result of the swaps and that the critical issue was whether the swaps should have been put on in the first place.

had been given at his employer's office.[6] Moreover, PaineWebber's trial counsel had viciously and personally attacked BankAtlantic's chairman throughout the trial, but especially in closing, in a manner very similar to that contained in the article read by the jury foreman. It is not surprising under the circumstances that the jury returned a verdict in favor of PaineWebber.

In its answer brief to the Eleventh Circuit, PaineWebber almost completely ignored the fiduciary duty, juror misconduct, and attorney misconduct issues raised by BankAtlantic. Instead, PaineWebber primarily argued, in a direct reversal of all its previous assertions to the district court,[7] that the financial advisor agreement covered the swap transactions and that, as a result, all of BankAtlantic's claims were barred by Florida's "economic loss rule." Based upon this argument, PaineWebber sought affirmance of the judgment in its favor on the amended complaint.

Building upon the false premise that the financial advisor agreement covered the swap transactions, PaineWebber also argued to the Eleventh Circuit on cross appeal that the indemnification agreement accompanying the financial advisor agreement applied to this case and that, contrary to the express language of the agreement itself, PaineWebber was entitled to indemnification for claims by BankAtlantic as well as for claims by third parties. Based upon this argument, PaineWebber sought reversal of the judgment against it on the counterclaim.

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[6] This is the same juror who PaineWebber quotes on page 21 of its petition as "exclaiming that the action was 'frivolous' and that they 'were sorry to see the case in court.'" Contrary to PaineWebber's assertion here, it was only this one juror who made that comment to the press at the conclusion of the trial, and he did so only seconds after talking with counsel for PaineWebber.

[7] On page 6 of its petition, PaineWebber asserts that it was BankAtlantic who changed position on this issue. PaineWebber has a curious tendency to accuse others of the very wrongdoing in which it is engaging.

BankAtlantic's reply brief to PaineWebber's cross appeal on the counterclaim demonstrated in detail that (1) the interest rate swap transactions were not within the scope of the indemnification agreement, (2) the express language of the indemnification agreement applies only to third parties and does not anywhere specifically state that it indemnifies, releases, or exculpates PaineWebber from claims for its own negligent conduct as unquestionably required by Florida law, and (3) the agreement does not, and no agreement can as a matter of public policy in Florida, indemnify for claims of wilful misconduct and gross negligence such as breach of fiduciary duty and fraud.

In the portion of its opinion focusing on the counterclaim, the Eleventh Circuit in essence accepted BankAtlantic's position by agreeing with the district court's interpretation of the indemnification agreement. A-26-28. The Eleventh Circuit also explained "as PaineWebber has contended *throughout* this litigation," that the swaps were not within the scope of the financial advisor agreement and, thus, not within the scope of the indemnification agreement. A-28-29 (emphasis added).

Although agreeing with the district court's interpretation of the indemnification agreement, the Eleventh Circuit did base its affirmance of the judgment against PaineWebber on the latter ground. The Eleventh Circuit correctly observed that "throughout this litigation" and "[u]ntil now, PaineWebber has argued that the interest rate swaps were outside of the contract." A-26, 28. For whatever reason, however, the essential holding of the Eleventh Circuit was that "the district court did not err in dismissing PaineWebber's counterclaim." A-29.

SUMMARY OF ARGUMENT

Contrary to PaineWebber's assertion, the material upon which the Eleventh Circuit relied for its affirmance of the decision against PaineWebber on its counterclaim *was* of record at the time of the trial court's order. Even if the material had not in fact been filed as of record prior to the district court's disposing of the counterclaim, both the final judgment and the Eleventh Circuit's affirmance are nonetheless correct as a matter of law.

The indemnification agreement facially establishes that it applies only to third parties. Moreover, the agreement does not anywhere specifically state that it indemnifies, releases, or exculpates PaineWebber from claims for its own negligent conduct as required by Florida law. *See, e.g., Wenzel v. Boyles Galvanizing Co.*, 920 F.2d 778, 781 (11th Cir. 1991). In addition, PaineWebber could not have exculpated itself for the breach of fiduciary duty, fraud, constructive fraud, and fraudulent concealment claims by BankAtlantic even if it had attempted to do so in the indemnification agreement. *See e.g., Kellums v. Freight Sales Centers, Inc.*, 467 So.2d 816 (Fla. 5th DCA 1985).

The economic loss rule has absolutely no bearing whatsoever on either court's decision about PaineWebber's counterclaim. In any event, the economic loss rule does not apply in this case even if the swaps were within the scope of the financial advisor agreement because there is an express exception to the rule, applicable here, for "independent torts." *See, e.g., Kee v. National Reserve Life Insurance Company*, 918 F.2d 1538, 1543 (11th Cir. 1990).

PaineWebber's entire argument about alternative dispute resolution does not have anything to do with affirmance of the district court's judgment against PaineWebber and is merely a diversion from the basic fact that PaineWebber had no release or indemnification covering claims of wrongdoing to BankAtlantic relating to the swaps.

ARGUMENT

I. THE MATERIAL UPON WHICH THE ELEVENTH CIRCUIT RELIED WAS OF RECORD AT THE TIME OF THE TRIAL COURT'S ORDER.

The most direct and simple response to PaineWebber's first reason for granting the writ is that, contrary to PaineWebber's assertion, the material upon which the Eleventh Circuit relied *was* of record at the time of the trial court's order.

Nine months *before* the district court's order disposing of the counterclaim, PaineWebber filed a memorandum regarding its affirmative defenses in the case and stated:

> It is important to distinguish that the damages which BankAtlantic now claims result solely from the swaps, not from any alleged breach of this Financial Advisory Agreement. *The interest rate swaps were [an] entirely separate and unrelated transaction.*

R11-341-3 (emphasis added). Then one month *before* the district court's order, PaineWebber filed a motion stating: "PaineWebber denies that the March 20, 1984 contract [the financial advisor agreement] is related to the sale of the interest rate swaps." R23-498-3.

Even after the district court's order, PaineWebber repeated the position in its memorandum in opposition to BankAtlantic's motion for judgment n.o.v. or new trial:

> The evidence amply demonstrated that the swaps were agreed to, or entered into, independent of any alleged financial advisor agreement.

and

> [T]he evidence at trial established that the [financial advisor] agreement did not cover interest rate swaps. . . . Thus, even had the jury concluded that the swaps were entered into while the financial advisor agreement was effective, *the evidence established that the agreement did not encompass the swaps.*

R38-711-7, 9 (emphasis added).

It was not until the post-trial motions had been denied and PaineWebber was safely clear of the district court judge who had handled the case from the beginning did it suddenly reverse its position. Only then did PaineWebber argue that the swaps *were* included within the scope of the financial advisor, and, thus, of the indemnification, agreements. The Eleventh Circuit was obviously correct in observing that "[u]ntil now, PaineWebber has argued that the interest rate swaps were outside of the contract." A-26.

Even if the documents establishing PaineWebber's position had not in fact been filed as of record prior to the district court's order disposing of the counterclaim, both the final judgment and the Eleventh Circuit's affirmance are nonetheless correct as a matter of law. The indemnification agreement, which was attached as an exhibit to, and expressly incorporated by reference into, the counterclaim, facially establishes that it applies only to third parties and does not anywhere specifically state that it indemnifies, releases, or exculpates PaineWebber from claims for its own negligent conduct as required by Florida law. A-69, 78-82.

Both the district court and the Eleventh Circuit cite *Gibbs v. Air Canada*, 810 F.2d 1529, 1532 (11th Cir. 1987) for the proposition that "[u]nder Florida law, construction of a contract of indemnity generally is a question of law for the court applying recognized rules of contract interpretation." A-26, 51. Independently applying those principles, both courts reached the same conclusion: "the plain language of the agreement indicates that the parties intended to indemnify PaineWebber solely against third party claims resulting from PaineWebber's agency relationship with BankAtlantic." A-28, 52.

In addition, the district court recognized (as fully argued by BankAtlantic in its memorandum to the court) that the indemnification agreement does not act as a re-

lease, or an exculpation from, liability because it does not speak in such terms. The Eleventh Circuit itself has noted in another case:

> Florida law is clear on the requirements for an effective exculpatory clause. Exculpatory clauses are not favored and are effective only if the clause "clearly state[s] that it releases the party from liability for his own *negligence*." *Goyings v. Jack & Ruth Eckerd Foundation*, 403 So.2d 1144, 1146 (Fla. Dist.Ct.App. 1981) (emphasis added). A clause simply disclaiming liability in general terms is insufficient to exculpate a party from its own negligence.

Wenzel v. Boyles Galvanizing Co., 920 F.2d 778, 781 (11th Cir. 1991); *see Gibbs*, *supra*, 810 F.2d at 1536.

This principle has been established in Florida law for a long time. *University Plaza Shopping Center, Inc. v. Stewart*, 272 So.2d 507 (Fla. 1973); *Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Company*, 374 So.2d 487 (Fla. 1979); *Levine v. A. Madley Corporation*, 516 So.2d 1101 (Fla. 1st DCA 1987).

The law in Florida is also clearly established that any attempt in an agreement to exculpate oneself for an intentional tort, wilfulness, and gross negligence is against public policy and will not be enforced. *E.g.*, *Kellums v. Freight Sales Centers, Inc.*, 467 So.2d 816 (Fla. 5th DCA 1985). PaineWebber, therefore, could not have exculpated itself for the breach of fiduciary duty, fraud, constructive fraud, and fraudulent concealment claims by BankAtlantic even if it had attempted to do so in the indemnification agreement.

Quite clearly, PaineWebber's first reason for allowing the writ is without merit. Indeed, it is frivolous.

II. THE ECONOMIC LOSS RULE IS IRRELEVANT TO THE COUNTERCLAIM.

PaineWebber's second reason for allowing the writ is more frivolous than the first. Even a cursory reading of the district court's order and the Eleventh Circuit's

opinion shows that the economic loss rule has absolutely no bearing whatsoever on either court's decision about PaineWebber's counterclaim. A-26-29, 51-52.

PaineWebber's argument about the economic loss rule was advanced below as a grounds for affirming the judgment against BankAtlantic on the jury verdict. It was directed solely toward BankAtlantic's tort claims. It does not as a matter of law have anything to do with the indemnification issue raised by PaineWebber's counterclaim. The Eleventh Circuit simply did not affirm "the judgment in favor of BankAtlantic on PaineWebber's counterclaim by holding that BankAtlantic could sue in tort for economic damages flowing from an alleged contractual breach" as asserted by PaineWebber on page 11 of its petition.[8]

A. Economic loss rule not applicable to this case.

In any event, the economic loss rule does not apply in this case even if the swaps were within the scope of the financial advisor agreement. As demonstrated to both the district court and the Eleventh Circuit, there is an express exception to the rule applicable here, for "independent torts." The Eleventh Circuit, in a discussion of Florida law, has clearly recognized this exception:

> [T]he mere existence of a contract claim does not automatically vitiate all causes of action in tort. Tort claims can be appropriate under Florida law where there is some wrongful conduct which amounts to an independent tort in addition to the conduct resulting in the contractual breach.

Kee v. National Reserve Life Insurance Company, 918 F.2d 1538, 1543 (11th Cir. 1990).

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[8] The only link between the economic loss rule and PaineWebber's counterclaim for indemnification is that both rest on an erroneous premise that interest rate swap transactions are within the scope of the financial advisor agreement and the indemnification agreement. *Compare* A-25 *with* A-28.

The issue, as further explained by another Eleventh Circuit opinion, is precisely what is required to prove a separate and independent tort ("whether the plaintiff need merely show that the same actions which resulted in a contractual breach also fulfilled the elements of a tort claim or whether the plaintiff must establish additional behavior by the defendant beyond that which breached the contract that supports a tort claim"). *Interstate Securities Corp. v. Hayes Corp.*, 920 F.2d 769, 776 n.11 (11th Cir. 1991). *See additionally, Boyd v. Oriole Homes Corp.*, 515 So.2d 300 (Fla. 4th DCA 1987), *cert. dismissed sub nom. Oriole Homes Corp. v. Boyd*, 525 So.2d 879 (Fla. 1988); *Aero International Corp. v. Florida National Bank of Miami*, 437 So.2d 156 (Fla. 3d DCA 1983), *pet. for rev. denied*, 449 So.2d 264 (Fla. 1984); *Senfeld v. Bank of Nova Scotia Trust Company (Cayman), Ltd.*, 450 So.2d 1157 (Fla. 3d DCA 1984).

The legal issue may best be seen in common sense terms. If a security guard under contract to the bank fails to appear for work and the vault is robbed, that is a breach of contract. If, however, the guard does not show up for work so that a thief can get into the vault, in exchange for which the guard is given a part of the take, that is a tort. In terms of the Eleventh Circuit's language in *Interstate Securities*, there was "additional behavior by the defendant" in the latter situation.

In this case, there was such "additional behavior." PaineWebber abused its fiduciary relationship with BankAtlantic, using fraudulent omissions and misrepresentations, to induce BankAtlantic to enter into interest rate swap transactions so that PaineWebber could help maintain the flow of commission money to itself from Homestead totalling over $7 million in a sixteen month period alone. R33-36, 102-103; R60-88-92. PaineWebber's undisclosed conflict of interest and gross abuse of its fiduciary relationship with BankAtlantic is akin to the guard

not showing up for work so that the thief can get into the vault and give the guard a part of the take.

Totally apart from the fact that the swaps are not within the scope of the financial advisor agreement, there is, therefore, "wrongful conduct which amounts to an independent tort." The economic loss rule has no application in this case.

B. No conflict with national policy.

PaineWebber argues that an adverse judgment on its counterclaim (because of an alleged failure to apply the economic loss rule) runs contrary to "national policy which fosters alternative dispute resolution." That is ludicrous.

Like PaineWebber's personal attack on the chairman of BankAtlantic at trial to divert attention from its gross breaches of fiduciary duty, PaineWebber's entire argument about alternative dispute resolution is a diversion from the basic fact that PaineWebber had no release or indemnification covering claims of wrongdoing to BankAtlantic relating to the swaps. Granted, a rational discussion about alternatives to litigation would be far more interesting than performing an analysis of a specific commercial agreement to determine that a release or indemnification has not been provided in light of Florida's law on exculpatory clauses. Such a discussion, however, is completely irrelevant to the issues.

Affirmance of the district court's judgment against PaineWebber does not have anything to do with any policy regarding alternative dispute resolution. Nor does it conflict with decisions of other courts of appeal, involve federal questions, depart from the accepted and usual course of judicial proceedings, call for an exercise of this Court's power of supervision, or otherwise raise special and important reasons for grant of writ of certiorari.

CONCLUSION

PaineWebber's petition for writ of certiorari should be denied. This Court should consider an award of damages to BankAtlantic as provided in Rule 42.2 of this Court.

Respectfully submitted,

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